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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 CARL D. SIMMONS,
12 CDCR #E-96088

13 Plaintiff,

14
15 vs.
16

17 PEOPLE OF THE STATE OF
18 CALIFORNIA, et al.,

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20 Defendants.
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Civil No. 08-1308 IEG (BLM)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED *IN FORMA*
PAUPERIS, ASSESSING NO
INITIAL PARTIAL FILING FEE
AND GARNISHING \$350 BALANCE
FROM PRISONER'S TRUST
ACCOUNT [Doc. No. 2]; AND**

**(2) SUA SPONTE DISMISSING
COMPLAINT AS FRIVOLOUS
PURSUANT TO
28 U.S.C. § 1915(e)(2)(B)(ii)
AND § 1915A(b)(1).**

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25 Plaintiff, a state inmate currently incarcerated at Calipatria State Prison, located in
26 Calipatria, California and proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C.
27 § 1983. Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a) to
28

1 commence a civil action; instead, he filed a Motion to Proceed *In Forma Pauperis* (“IFP”)
 2 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4].

3 **I. Motion to Proceed IFP**

4 All parties instituting any civil action, suit or proceeding in a district court of the United
 5 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 6 U.S.C. § 1914(a). An action may proceed despite a party’s failure to prepay the entire fee only
 7 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 8 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,
 9 remain obligated to pay the entire fee in installments, regardless of whether the action is
 10 ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

11 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
 12 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
 13 statement (or institutional equivalent) for the prisoner for the six-month period immediately
 14 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). From the certified trust account
 15 statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits
 16 in the account for the past six months, or (b) the average monthly balance in the account for the
 17 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
 18 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That institution having custody of the prisoner must
 19 collect subsequent payments, assessed at 20% of the preceding month’s income, in any month
 20 in which the prisoner’s account exceeds \$10, and forward those payments to the Court until the
 21 entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

22 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
 23 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
 24 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement shows that
 25 he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4)
 26 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or
 27 appealing a civil action or criminal judgment for the reason that the prisoner has no assets and
 28 no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that

28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available to him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 4] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

II. Initial Screening per 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)

A. Standard of Review

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from defendants who are immune. *See* 28 U.S.C. § 1915(e)(2)(B) and § 1915A; *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint that fails to state a claim); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). However, 28 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *See Calhoun*, 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601,

604-05 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of process is made on the opposing parties”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”; *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

B. Failure to State a Claim

As currently pleaded, it is clear that Plaintiff’s Complaint fails to state a cognizable claim under 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

The allegations in Plaintiff’s Complaint are nearly incomprehensible. Plaintiff claims to be seeking jurisdiction under the “Compassionate Use Act of 1996” and refers to himself as a “turncoat representative.” (Compl. at 1.) The allegations contained under the causes of action are photocopies of “ducats” apparently received by the Plaintiff so that he could go to the medical and dental clinics in the prison. (*Id.* at 3-5.) In reviewing the Complaint, it is simply impossible to understand the underlying factual allegations that Plaintiff claims give rise to the alleged constitutional violation. A complaint is frivolous “where it lacks an arguable basis either

1 in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Here, the Court finds
 2 Plaintiff’s claims to be frivolous under 1915(e)(2)(B) because they lack even “an arguable basis
 3 either in law or in fact,” and appear “fanciful,” “fantastic,” or “delusional.” *Neitzke*, 490 U.S.
 4 at 325, 328. While the Court will provide Plaintiff with one opportunity to amend his
 5 Complaint, he must provide clearer factual allegations in his Amended Complaint.

6 **III. Conclusion and Order**

7 Good cause appearing, **IT IS HEREBY ORDERED** that:

8 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4] is
 9 **GRANTED**.

10 2. The Secretary of California Department of Corrections and Rehabilitation, or his
 11 designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee
 12 owed in this case by collecting monthly payments from the account in an amount equal to twenty
 13 percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court
 14 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
 15 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
 16 ASSIGNED TO THIS ACTION.

17 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
 18 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
 19 Sacramento, California 95814.

20 **IT IS FURTHER ORDERED** that:


21 4. Plaintiff’s Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
 22 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
 23 from the date this Order is stamped “Filed” in which to file a First Amended Complaint which
 24 cures all the deficiencies of pleading noted above. Plaintiff’s Amended Complaint must be
 25 complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1.
 26 Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed
 27 to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if
 28 Plaintiff’s Amended Complaint fails to state a claim upon which relief may be granted, it may

1 be dismissed without further leave to amend and may hereafter be counted as a “strike” under
2 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

3 5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

4 **IT IS SO ORDERED.**

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6 **DATED: September 9, 2008**

7 
8 **IRMA E. GONZALEZ, Chief Judge**
9 **United States District Court**